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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 900

CONSTANTINE GUINESS, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Carl L. Shipley and Thomas A. Ziebarth on behalf of Constantine Guiness pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above captioned case on February 3, 1960, dismissing plaintiff's petition.

OPINION BELOW

The opinion of the court below is reported at page 1a of the Appendix hereto.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the United States Court of Claims erred in holding that that petitioner, an officer of the Military Sea Transportation Service, deserted his ship as the term "desertion" is defined in that agency's own regulations.

STATUTE AND REGULATION INVOLVED

46 U.S.C. 701 provides in pertinent part:

> "Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows: *First:* For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned * * *."

The applicable portion of the *Civilian Marine Personnel Instruction No. 45,* Section 6, dated March 21, 1952, hereinafter referred to as the *Regulation,* provides:

> "6-1. DEFINITION.—Desertion is defined to be the quitting of a ship and her services without leave and with the intent not again to return to the ship's duties. Accordingly, desertion must necessarily be distinguished from absence without leave. Therefore, whenever a seaman leaves a ship without permission and subsequently returns thereto, such subsequent return creates a presumption which defeats the intent 'not again to return to the ship's duties.' * * * Employees may be charged with desertion, however, when they perma-

nently leave the ship in continental U.S. ports, other than the home port, or in any other port in violation of the Articles of Employment or Instructions related thereto.

6-2. ESTABLISHMENT OF INTENT REQUIRED.—In order that the charge of desertion may be warranted, it is mandatory that the intent to desert be established by a preponderance of the evidence. Sufficient evidence to support the charge is dependent upon each particular case. For example:

a. It has been held that where a seaman leaves any of his clothes or equipment aboard the ship, such fact may defeat a charge of desertion.

b. It has also been held that cruel treatment or just fear for personal safety is a valid excuse which would defeat a charge of desertion.

c. Where a seaman left the ship by permission, got drunk, and was imprisoned, which prevented his return to his ship, but there was nothing to indicate that he had any intention not to return, such seaman was held not guilty of desertion.

d. Where a seaman went ashore without intention to desert and while on shore was detained as a witness by civil authorities, and in the meantime his ship left the port, it was held that this did not constitute desertion.

The foregoing constitute only a few of the many cases on the subject of desertion of seamen. See Title 46, USC, Section 701 for other cases on the subject."

STATEMENT OF THE CASE

Petitioner is a veteran preference eligible with Civil Service status, who brought suit in the court below to recover back pay and allowances including accrued leave, from January 16, 1956, on the grounds that he

was wrongfully discharged from his position in the Military Sea Transportation Service. Petitioner was dismissed for allegedly deserting his ship, the USNS SHORT SPLICE, on January 20, 1956, while it was docked at the U. S. Naval Operating Base, Bermuda.

Both the Military Sea Transportation Service (MSTS) and the Civil Service Commission, to which petitioner appealed, sustained his dismissal.

The facts surrounding the alleged desertion are as follows:

1. On January 19, 1956, when petitioner was serving as First Engineer on board the USNS SHORT SPLICE, the ship was docked at the U. S. Naval Operating Base at Bermuda. During off duty hours petitioner went ashore to have a few drinks at the Chief Petty Officers' Club, where he was assaulted by Benbow, a subordinate under petitioner's immediate command, because Benbow was critical of the way petitioner had treated another of his subordinates, one Livingston, who was also under petitioner's command and a shipmate of Benbow.

2. After Benbow assaulted his superior officer in the presence of other subordinate crew members, he ran away, with the ultimate purpose of returning to the ship.

3. Petitioner returned to his ship and attempted to get Benbow to apologize in the presence of the crew members in whose presence he had assaulted his superior officer in order to restore discipline over his subordinates.

4. Second Mate Smiechowski, a deck officer of the ship, held petitioner's arms while Benbow again assaulted petitioner in the presence of other crew member's inflicting rather serious injuries.

5. Whereupon, petitioner, injured and unsupported by other officers on the ship took refuge ashore in a hotel.

6. After checking into his hotel room, petitioner telephoned the Chief Engineer aboard the ship and told him of the Captain's wish to have the ballast tanks filled in the morning. He also stated he would not sail on a ship where a wiper could punch a First Engineer.

7. Petitioner awoke the next morning, obtained medical care at a Bermuda hospital and learned that his ship had sailed without him.

8. Petitioner at once took a plane to New York, the ship's home port, reported to his superior civilian officer at Navy headquarters and attempted to rejoin his ship at its first port of call, but was denied permission to do so.

9. At the time petitioner left the ship, many of his personal belongings were left behind including his Engineer's license.

ARGUMENT

To prove desertion, the *Regulation, supra, Sec. 6-1* requires a showing that the person accused quit the ship and her services:

> "* * * without leave and with the intent not again to return to the ship's duties * * *."

Sec. 6-2 of the *Regulation* establishes a mandatory evidentiary rule that "* * * the intent to desert be established by a preponderance of the evidence * * *." Petitioner submits that the preponderance of evidence does not support the proposition that petitioner intended to desert his ship. A preponderance of evidence is the superior weight of substantial evidence, not a mere fragment or scintilla. *N.L.R.B.* v. *Falk Corporation*, 102 F. 2d 383.

Personal Gear Left Aboard

"It has been held that where a seaman leaves any of his clothes or equipment aboard the ship, such fact may defeat a charge of desertion." *Regulation, supra, Sec. 6-2-a.* Petitioner left many of his personal belongings aboard the ship, including his Engineer's license. He also borrowed a piece of luggage from a shipmate, establishing a further inference of intent to return.

Just Fear for Personal Safety

When petitioner returned aboard his ship, his fellow officer, the second mate, instead of assisting him in the maintenance of good order and discipline where a subordinate was involved, took the part of the subordinate and held petitioner while he was struck and injured by the assaulting subordinate.

The *Regulation, supra, Section 6-2-b.* states further:

> "It has also been held that a cruel treatment or just fear for personal safety is a valid excuse which would defeat a charge of desertion."

Petitioner submits that when a wiper in the Engineering Department aboard a ship can enlist the aid of the ship's second mate in beating the first assistant engineer, that he was justly in fear for his personal safety. He was justified in leaving the ship until or unless the disciplinary breach had been mended and his proper position of authority reestablished, and was entitled to the cooperation of his fellow officers, to this end. Neither desertion nor absence without leave can occur when there is reasonable or justifiable cause for leaving a ship. Any other rule would be barbaric and out of step with the general policy of the law.

In re Scott's Petition, 143 F. Supp. 175, (N.D. Calif. 1956)
Barfknecht v. *Shepard S.S. Co.* 99 P. 2d 387 (Wash. 1939)
The Alanzo, (D.C. Me. 1865) Fed. Cas. No. 258
The Gem, (D.C. Mass. 1867) Fed. Cas. No. 5304
City of Mobile, 116 F. 212 (S.D. Ala. 1902)
McKinnon v. *Reed*, 99 F. 624 (D.C. Pa. 1889)

Continuing Exercise of Responsibility

After petitioner had left the ship, he called the Chief Engineer and relayed the Captain's instructions regarding the filling of the ballast tanks. He also informed his superior of his reasons for leaving, viz. fear for his personal safety and need of medical aid. This telephone call shows petitioner's continuing sense of responsibility toward his duties aboard the ship, even *after* he had allegedly deserted. Furthermore, it corroborates his contention that he was fearful for his personal safety.

Timely Effort to Return

In the very definition of desertion, the subsequent return of a seaman to his ship, " * * * creates a presumption which defeats the intent 'not again to return to the ship's duties' * * *." *Regulation, supra, Sec. 6-1.*

Petitioner could not return directly to his ship since it was on the high seas. However, he reported immediately to the appropriate authorities in the ship's home port of New York and requested permission to rejoin his ship in Norfolk. This request was denied.

The "animo non revertendi" prerequisite to prove desertion has not been established by any evidence, much less a preponderance. *The John Martin*, 13 Fed.